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No. 89-1802

FILED
JUN 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

WALTER GREENE, JR.,

Petitioner,

vs.

ARMCO, INC., BROBECK, PHLEGER & HARRISON, JAMES L. MEEDER and WILLIAM C. ANDERSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

The complicated background of the eleven lawsuits filed by Mr. Greene over the years arising from essentially the same subject matter is recounted in the District Court's opinion granting summary

judgment in favor of respondents, which is published as Greene v. Armco, Inc., 696 F. Supp. 1328 (C.D. Cal. 1988). Mr. Greene's petition is directed against the Ninth Circuit's unpublished affirmance of the summary judgment entered by the District Court. The "earlier filed" non-jury actions referred to in Mr. Greene's petition are designated as "Greene I" and "Greene II" in the District Court's published opinion. What the petition refers to as the "later filed jury action" is designated as "Greene III" and was the object of the District Court's opinion and entry of summary judgment.

The petitioner seeks to defeat issue preclusion by arguing that his waiver of the right to a jury trial in Greene I and Greene II should eliminate the preclusive effect of the judgment entered in those actions with respect to the petitioner's later filed action, Greene III. This

contention is not worthy of certiorari for three reasons. First, This Court already has held to the contrary in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Second, it is well settled that if the original pleadings in an action effectively waive trial by jury under Federal Rule of Civil Procedure 38, the waiver of right to trial by jury of all matters in those pleadings cannot be later revived by amending the original pleadings or by filing a new action. Third, Mr. Greene is making his argument belatedly in the wrong case. Any petition presenting the question of whether Greene I and Greene II should have been stayed in favor of a jury trial of Greene III was required to have been filed in 1986 after the Ninth Circuit affirmed the judgments in Greene I and II. The right to jury trial is not, and has never been, an issue in Greene III, which was decided by summary

judgment.

Mr. Greene's contentions regarding "fraud upon the court" also are undeserving of certiorari. First, the sole basis for Mr. Greene's charge of "fraud" is his disagreement with the District Court's finding in Greene I and II that respondent Meeder had not committed perjury in the California State Bar's investigation of Mr. Greene's moral fitness, which finding was affirmed by the Ninth Circuit in 1986. As the Ninth Circuit pointed out in its recent affirmance of the judgment in Greene III, Mr. Greene's raising of the identical issue of perjury and calling it "fraud upon the court," without any additional showing, does not act to disturb the preclusive effect of the prior adjudication. Mr. Greene's petition raises no properly reviewable issue on this subject.

I.

THE QUESTIONS PRESENTED ARE NOT APPROPRIATE FOR CERTIORARI

The Not for Publication Memorandum of the United states Court of Appeal for the Ninth Circuit styled Walter Greene, Jr. v. Armco, Inc., etc., et al., No. 88-6509 from which the petitioner seeks relief is neither a decision of a federal court of appeal (i) that conflicts with decisions of other sister courts "on the same matter," (see e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites, 456 U.S. 694, 700 (1982)); (ii) nor one that decides federal questions "in a way in conflict" with a state court (see e.g., Andersen v. Maryland, 427 U.S. 463, 470 n.5 (1976); Lakeside v. Oregon, 435 U.S. 333, 336 n.3 (1978)); nor one that has "so far sanctioned such a departure by a lower court, as to

call for an exercise of this Court's power of supervision" (see e.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 1981)) under Rule 10.1(a) of the Rules of the Supreme Court.

Nor is the petition based on a decision by a federal court of appeal on an important question of federal law (i) that has not been, but should be, decided by the Supreme Court, or (ii) that has been decided "in a way in conflict wtih applicable decisions of this Court," as required under Rule 10(c).

A. The Supreme Court Has Twice Decided the Scope of Issue Preclusion for Non-Jury Judgments

Mr. Greene contends that the "question of what should be the proper order when there are multiple actions with the later filed action containing the right to jury

[sic] has not been decided by this Court." (Petition at 14.) However, this Court already twice has determined that the offensive use of collateral estoppel, which forecloses litigation before a jury of factual issues already decided in a non-jury action, does not violate the Seventh Amendment. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Katchen v. Landy, 382 U.S. 323 (1966).

The question presented in Parklane Hosiery was "whether a party who has had issues of fact adjudicated adversely to it in an equitable [non-jury] action may be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party." Parklane Hosiery, 439 U.S. at 324. In resolving the issue, the Supreme Court acknowledged that it already had held in Katchen that "an equitable [non-jury]

determination can have collateral estoppel effect in a subsequent legal action and this estoppel does not violate the Seventh Amendment." Parklane Hosiery, 439 U.S. at 335.

In Parklane Hosiery, the party against whom collateral estoppel was invoked had been a party in another action, an SEC suit brought in the district court in which a jury was not required. Judgment already had been issued in that proceeding, and had been affirmed by the court of appeals. The Supreme Court held, inter alia, that this first judgment would have a preclusive effect in the later action, even though the second action was triable to a jury.

In short, Parklane Hosiery established that "preclusion may not be defeated simply by showing that there was no right to trial by jury in the first action and that there is a constitutional right to trial by jury

in the second action, no matter what anguish that may cause to those who believe in juries." 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4465 at 600 (1981); see also Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348, 355-57 (7th Cir. 1987); Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982); Benjamin v. Traffic Exec. Ass'n. - Eastern Railroads, 688 F.Supp. 903, 909-910 (S.D.N.Y. 1988). Indeed, in Parklane Hosiery, the Court found this principle implicit in the very cases cited by Mr. Greene, Beacon Theatre, Inc. v. Westover, 359 U.S. 500 (1959) and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962). (Petition at 2.) As the Court noted in Parklane, "[b]oth the premise of Beacon Theatres, and the fact that it enunciated no more than a general prudential rule were confirmed by this Court's decision in Katchen v. Landy, 382 U.S. 323."

Then quoting from that decision the Court continued:

> Both Beacon Theatres and Dairy Queen recognized there might be situations in which the Court would proceed to resolve the equitable [non-jury] claim first even though the results might be dispositive of the issues involved in the legal claim.

Parklane Hosiery, 439 U.S. at 335-36.

In the case at bar, the petitioner seeks to defeat preclusion by arguing that his waiver of the right to jury in his first legal action should eliminate the preclusive effect of that action's judgment in the petitioner's later filed legal action. Specifically, the petitioner requests that the Court determine, "whether the principles of Beacon Theatre and Dairy Queen apply when the jury case is filed subsequent to the non-jury case." (Petition at 3.) As the tougher question, i.e., whether an equity judgment can preclude a subsequent legal action,

already has been determined, certainly this petition is not appropriate for certiorari.

B. Waiver of Jury Trial Cannot Be Revived

It is well settled that if the original pleadings in a legal action effectively waive trial by jury under Federal Rule of Civil Procedure 38, the right to trial by jury of all matters waived in those pleadings cannot be later revived by amending the original pleadings or by filing a new legal action. Walton v. Eaton Corp., 563 F.2d 66, 71 (3d Cir. 1977); Hostrop v. Board of Junior College District No. 515, 523 F.2d 569, 581 (7th Cir. 1975); Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045, 1049 (9th Cir. 1974); Lanza v. Drexel and Co., 479 F.2d 1277, 1310 (2d Cir. 1973); Williams v. Farmers and Merchants Ins. Co., 457 F.2d 37, 38 (8th Cir. 1972); Connecticut

General Life Ins. Co. v. Breslin, 332 F.2d 928, 931 (5th Cir. 1964). Indeed, Mr. Greene concedes as much. (Petition at 18.)

Nonetheless, Mr. Greene seeks to vitiate this rule of law in favor of one in which a plaintiff would be entitled to stay a lawsuit in which he has waived jury trial simply by filing another lawsuit in which he does not waive jury trial. (Petition at 19.) Such a rule, if adopted, would nullify the provisions of Federal Rule of Civil Procedure 38, which requires a timely demand for jury trial, and would lead to a multiplicity of lawsuits and stays. In short, the proffered issue is not appropriate for certiorari.

C. The "Fraud upon the Court" Issue Does Not Rise above the Level of Simple Issue Preclusion

Mr. Greene's contentions regarding "fraud upon the court" do not present any issue appropriate for certiorari. It is, of course, already settled that an actual showing of fraud on the court may create an exception to the preclusion doctrines. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). However, in the instant case, Mr. Greene's charge of "fraud" is based solely upon matters that were raised in the appeal from the judgment entered in Greene I and Greene II and that were adjudicated against him by the Ninth Circuit in 1986.

Indeed, as the District Court noted in its opinion in Greene III:

> Greene has presented no evidence to support his contention that

> the judgment in Greene I and II are not entitled to preclusive effect because they were the product of fraud. The indications of fraud that he points to, Meeder's alleged perjury before the Bar and Meeder's alleged participation in the findings of this Court, have been addressed by this Court and by the Ninth Circuit.

Greene v. Armco, Inc., 696 F.Supp. at 1340.

In affirming the judgment in Greene III, the Ninth Circuit also recognized that the matters proffered by Mr. Greene as constituting "fraud" were matters that already had been addressed in the appeal from Greene I and Greene II and had been adjudicated against him. After citing to its unpublished affirmance entered in 1986, the Ninth Circuit concluded: "Since the purported perjury and subsequent judicial cover up constitute the sole basis for appellant's charge of fraud upon the court, his section 1981 claim is barred by res

judicata." (Exhibit "A" to Petition at 9, emphasis added.) In other words, Mr. Greene made no cognizable showing of fraud beyond matters that already had been determined against him. This facet of the Ninth Circuit's affirmance presents no appropriate issue for review by this Court.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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